

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMIT 46

DISCHARGES IN DITCHES

This document is a supplement to the national decision document for Nationwide Permit (NWP) 46, and addresses the regional modifications and conditions for this NWP. The Great Lakes & Ohio River Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1.0 Background

In the September 26, 2006, issue of the Federal Register (71 FR 56258), the Corps of Engineers (Corps) published its proposal to reissue the existing NWPs and issue six new NWPs. To solicit comments on its proposed regional conditions for the proposed NWP reissuance, the Detroit District issued a public notice on October 24, 2006 (Encl. 1). The notice included regional conditions proposed by Detroit District. The issuance of the NWPs was announced in the March 12, 2007, Federal Register notice (72 FR 11092). After the publication of the final NWPs, the Detroit District considered the need for regional conditions for this NWP. The Detroit District findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

No comments were submitted on NWP 46. The MDEQ denies Water Quality Certification (WQC) and finds that projects proposed under this NWP are inconsistent with the Coastal Zone Management Program (CZM) (Encl. 3).

2.2 Comments on Proposed Regional Conditions applicable to NWP 46

The Detroit District did not propose any specific Regional Conditions on NWP 46.

2.3 Comments on Proposed Regional Conditions applicable to all NWPs

2.3.1 Proposed Regional Condition 1

Requirement to Submit a Joint Application.

The Detroit District proposes to continue its requirement to submit a Joint State/Federal application for proposed activities within Michigan. The Detroit District did not receive any comments on this condition. Since 1984, the Detroit District and the State of Michigan have had a joint processing agreement. This condition formalizes continuing this agreement with respect to the NWP. The absence of this condition would cause additional time, expense, and confusion for the regulated public. The requirement to submit a joint application will mean that even for those NWPs that do not require Pre-Construction Notification (PCN) by the terms of the NWP, a PCN is regionally required and satisfied by the submittal of the required joint application. The District clarifies that the submittal of an application is not an authorization to perform the work. Requiring a PCN avoids the situation in which work is accomplished without the benefit of prior agency review and a determination as to whether the work would in fact qualify for a NWP and would in fact not exceed the minimal adverse effects threshold of the NWP.

2.3.2 Proposed Regional Condition 2

Required State Authorizations.

As a product of Detroit District's working relationship with the Michigan Department of Environmental Quality (MDEQ), the District proposes to continue notifying permittees of MDEQ permit requirements in NWP authorizations. This directly alerts the public to State permit requirements, and reduces potential unauthorized work. In addition, the MDEQ provided addendum comments dated May 24, 2007 (Encl. 7). The MDEQ stated a general condition applicable to all NWPs in order to receive Section 401 Water Quality Certification (WQC) and Section 307(c) (1) Coastal Zone Management (CZM) federal consistency:

In sensitive natural resource areas NWPs may only be issued if a state permit is also issued. These areas include: Designated Natural Rivers, Designated High Risk Erosion Areas, Designated Wilderness and Natural Areas, Designated Environmental Areas, areas containing state or federally listed or proposed threatened or endangered species, Designated Trout Streams, Designated Critical Dune Areas, and identified historic or archeological areas. NWPs issued absent state permit in these areas are denied Section 401 water quality certification and would be inconsistent with Michigan's CZM Program.

The Detroit District proposes to add this MDEQ condition to each NWP, despite partial redundancy to proposed District Regional Conditions 6, 7, and 8 (below).

2.3.3 Proposed Regional Condition 3

Presumed Certifications in State Authorizations.

The Detroit District proposes a new regional condition based on the presumption of State 401 Water Quality Certification and Coastal Zone Management certification inherent in a State authorization. The issuance of a permit by the MDEQ is understood to satisfy 401 WQC and

CZM certification, provided the scope of authorized work is the same as that proposed in the application provided to the Corps. The Detroit District will presume that if the MDEQ has issued its authorization, then 401 WQC and CZM certification have been satisfied. This will save the additional time and expense that would be consumed by further coordination. The Detroit District received indirect concurrence with this position in the MDEQ letter dated May 24, 2007, which implied that no certification was conferred without state permit issuance.

2.3.4 Proposed Regional Condition 4

Requirements for Contaminated Dredging.

The Detroit District proposes to continue its requirement on dredging contaminated sediments that would be applicable to all NWP. The condition addresses placement and testing requirements for the dredged materials, as stated in Section 7.4 below. The Detroit District did not receive any comments on the condition. The District concluded that one standard condition on dredging contaminated material would simplify matters for both the public and Corps staff. Contaminated sediments are an unfortunate industrial legacy in the Great Lakes, and the condition assures that projects affecting contaminated materials will continue to receive attention to assure that the impacts are no more than minimal.

2.3.5 Proposed Regional Condition 5

Preferred Dredging Periods.

The Detroit District proposes to continue the limitation of dredging to periods as identified by the Michigan Department of Natural Resources (MDNR). The MDNR identifies preferred dredge periods for protection of fisheries. The Detroit District did not receive any comments on this Regional Condition, a condition that reflects no change from the previous authorization. The Detroit District determined that a Regional Condition including the preferred dredge periods is appropriate, provided that there is sufficient flexibility to accommodate changes in water levels and special situations. Dredging can be performed under numerous NWPs, such as 3, 7, 12, 19, 35 and 43. It would be reasonable to set the standard for all of the NWPs in Michigan rather than limit it to a select few. This condition would prevent more than minimal harm to aquatic life by authorizing dredging only outside of known reproduction periods. This would limit exposure of sensitive eggs and fry to increased suspended sediment, increased soluble contaminants, and reduced oxygen levels. Therefore, the Detroit District will continue to include a condition as follows: Dredging will be performed during MDNR preferred dredge periods except when the Corps has specifically determined that the limits are unwarranted (for example MDEQ has issued a permit and has not restricted the dredging activities to these periods).

2.3.6 Proposed Regional Condition 6

Designated Critical Resource Waters.

General Condition 19 stipulates types of critical resource waters. The Detroit District did not receive any comments on the Critical Resource Waters, and proposes to continue the current listings in Michigan. Dredging in these waters is excluded from the NWPs. The Detroit District proposes to continue listing the following National and state officially Designated Critical Resource Waters in Michigan.

a. NOAA-Designated Marine Sanctuaries: The Thunder Bay National Marine Sanctuary and Underwater Preserve is located in Lake Huron off Alpena, Michigan.

b. National Estuarine Research Reserves (NERR): There are no NERRs within the Detroit District.

c. State Natural Heritage Sites: There are no areas designated as state natural heritage sites through a state legislative or regulatory process.

d. Outstanding National Resource Waters or Other Waters Officially Designated: The list of Critical Resource Waters (General Condition 19) in Michigan is amended to include the following:

All areas designated under Part 351, Wilderness and Natural Areas, of the Natural Resources and Environmental Protection Act, Public Act 451, 1994, as amended.

All rivers designated under Part 305, Natural Rivers, of the Natural Resources and Environmental Protection Act, as amended.

All Environmental Areas designated under Part 323, Shorelands Protection and Management, of the Natural Resources and Environmental Protection Act, as amended.

2.3.7 Proposed Regional Condition 7

National Wild and Scenic Rivers (NWSR).

There are no proposed amendments to the National Wild and Scenic Rivers list in the Detroit District. The Detroit District proposes to continue the existing listing, but with one clarification. We received a comment identifying the need to clarify the western termination point of the NWSR segment on the Pere Marquette River because US Highway 31, the termination point of record, has been relocated to the east. The relocation of a roadway does not alter the limits of a Congressionally designated NWSR segment of a river. Thus, the western terminus of the NWSR segment remains at Pere Marquette Highway, the old US Highway 31 bridge. We received no other comments on National Wild and Scenic Rivers.

2.3.8 Proposed Regional Condition 8

Critical Habitat for Federally Listed Threatened and Endangered Species in the Detroit District.

a. The Detroit District proposes to continue the listing of critical habitat for piping plover (*Charadrius melodus*) in Michigan that was designated in the May 7, 2001 Federal Register (Vol. 66, No. 88, pages 22938-22969). We did not receive any comments concerning this listing.

b. The Detroit District proposes to add to the District's list of critical habitat sites in Michigan a site listing for Hines' Emerald Dragonfly (*Somatochlora hineana*), proposed on July 26, 2006 in the Federal Register (Vol. 71, No. 143, pages 42441-42519). We received a comment expressing support for this proposed addition from the U.S. Fish and Wildlife Service (FWS) (Encl. 2).

3.0 Waters Excluded from NWP or Subject to Additional Pre-Construction Notification Requirements

3.1 Waters excluded from use of this NWP

The Detroit District did not receive recommendations on prohibiting this NWP in certain waters. However, the MDEQ denied Water Quality Certification and Coastal Zone Management (WQC/CZM) consistency for this NWP (Encl. 3). The Corps addresses the outstanding natural resource areas via General Condition 19, and the Detroit District addresses them with Regional Conditions 6, Critical Resource Waters in Michigan, and 7, National Wild and Scenic Rivers. These conditions prohibit use of some NWPs in Critical Resource Waters and in National Wild and Scenic Rivers, while retaining availability for NWPs where impacts are no more than minimal. The District has not identified any specific waters that will be excluded from use of this NWP, however required notification and case specific coordination will provide MDEQ ample opportunity to notify the District if proposed work is in a resource water so designated by the State.

3.2 Waters subjected to additional pre-construction notification requirements

The Detroit District has not identified specific waters that will be subject to additional notification requirements for activities authorized by this NWP. However, based on the joint processing agreement with the State of Michigan, Detroit District proposes to continue the condition which requires a joint Corps/MDEQ application for all work within Michigan. Applicants for this and any other NWP would be required to submit a verification request.

4.0 Alternatives

4.1 No Regional Conditions

Without proposed Regional Conditions 1, 2 and 3 which apply to all NWPs, an additional burden would be imposed on applicants by dismantling the working agreement between the Corps and MDEQ. Applicants would face increased complexity, paperwork, and time to secure State and Federal permits. Regional Conditions 4 and 5, applicable to all NWPs, are necessary to limit potential impacts on water quality that may occur from mishandling contaminated sediments, and limit impacts on aquatic resources. Without proposed Regional Conditions 6 and 7, applicable to all NWPs, which supplements the list of Critical Waters, valuable aquatic resources would be affected. Without proposed Regional Condition 8, the final condition, critical habitat for Federally listed threatened and endangered species may be impacted.

4.2 Alternative Regional Limits or Pre-Construction Notification Thresholds

The Detroit District has considered alternative limits and notification thresholds on the NWP. The proposed Regional Condition 1, which requires a joint MDEQ/Corps application form for all activities in Michigan, provides the District considerable latitude in identifying any activities which may have more than minimal impact. The District may either appropriately condition these activities, or evaluate these actions through the standard permit process. The Detroit District considers the activities authorized under the terms and conditions of the NWP to have no more than minimal impact and has not proposed to reduce those limits.

4.3 Alternative Regional Nationwide Permit Conditions

Detroit District has proposed regional conditions to both ensure that activities under the NWP have no more than minimal impact and also to provide additional protection to the aquatic environment. No suggestions for additional regional conditions were submitted to the District. Detroit District considers further regional conditions unwarranted in ensuring that NWP authorizations are limited to those with minimal impacts.

5.0 Endangered Species Act

5.1 General Considerations

The Detroit District will individually review NWP requests for compliance with the Endangered Species Act. The proposed Regional Condition 1, applicable to all NWPs, which requires a joint MDEQ/Corps application will insure that the Corps has the opportunity to do so. To make an initial determination, Detroit District uses the most current information provided from the U.S. Fish and Wildlife Service (FWS), data gathered by the Corps, or the Michigan Natural Features Inventory. In Michigan, a majority of endangered species are associated with shoreline ecosystems or wetlands. Although clearly their dispersal is limited, endangered species are an issue of concern for NWPs in some locations. Construction along the shoreline may encounter species such as: piping plover, Houghton's goldenrod, pitcher's thistle, dwarf lake iris, and Indiana bat, among others. Piping plover critical habitat was formally designated on May 7, 2001, and Hine's Emerald Dragonfly critical habitat was formally designated on July 26, 2006. The condition requiring a joint MDEQ/Corps application provides Detroit District the chance to evaluate activities for impacts to endangered species and compliance with the Endangered Species Act. Additional notification provisions are not considered necessary. The District has a standard local operating procedure agreement with FWS for endangered species review on NWPs, as discussed below. Where endangered or threatened species are a concern, the District may consult with FWS during the NWP review process, or the District may assert its discretionary authority to require an individual permit for proposed work and initiate consultation through the individual permit process. The latter of these choices should only be used if there is value added that compensates for the added workload due to processing more individual permits. If the consultation is conducted under the Nationwide Permit process without the District's assertion of its discretionary authority, then the applicant will be notified that he can not proceed until the consultation is complete. If the District determines that the activity would have no affect on any endangered species, then the District would proceed to issue the NWP authorization.

5.2 Local Operating Procedures for Endangered Species

The Detroit District completed a Standard Local Operating Procedures for Endangered Species (SLOPES) agreement with FWS. The SLOPES agreement sets up a local operating procedure that is used for all projects that are reviewed under the Corps of Engineers general permit

regulations, including NWP. The procedure establishes a review process for the Corps and a framework for coordination with FWS. The local operating procedure ensures that the activities authorized under the NWP comply with ESA by initiating coordination with FWS for certain actions. A completed SLOPES agreement for Detroit District was finalized on August 11, 2000.

6.0 National Historic Preservation Act

6.1 General Considerations

The Detroit District proposes regional condition number one, applicable to all NWPs, based on a joint processing agreement between the Corps of Engineers (Corps) and the Michigan Department of Environmental Quality (MDEQ), to provide that for every proposed project the submittal of a joint Corps/MDEQ permit application is required in Michigan. No NWP authorization is recognized without submittal (and processing) of a permit application. This not only eliminates any question as to whether a pre-construction notification (PCN) is required, but also provides the opportunity to review every proposed project for activities in geographic areas of high cultural resource site potential, or known locations of cultural resources including prehistoric sites, historic sites, tribal lands, traditional cultural properties, state landmarks or National Historic Landmarks. The district engineer may: (1) consult with SHPO or Tribes during the NWP review process, or (2) the district engineer may assert its discretionary authority to require an individual permit for proposed work and initiate consultation through the individual permit process. The district engineer will pursue Option 2 only if there is value added that compensates for the increase in workload due to processing more individual permits (IPs). If the District determines that the activity would have no potential to cause effects on any historic properties, the District could proceed to issue the NWP authorization without further consultation with the SHPO. In accordance with General Condition 18(a), if there is potential to effect and consultation is conducted under the nationwide permit process without the District asserting discretionary authority, then the applicant must be notified that work cannot be verified under the NWP until all Section 106 requirements have been satisfied.

6.2 Local Operating Procedures for National Historic Preservation Act

Section 106 procedures are currently under development between the Detroit District and the SHPO. On receipt of an application, the District determines whether or not the proposed action requires a Corps permit, and if so, determines the regulatory scope of analysis in order to initiate the NEPA process. The District determines whether the proposed action is a type of activity that has the potential to cause effects on historic properties, and defines the potential of the activity to cause effects on historic properties. The District identifies historic properties within the identified regulatory scope of analysis through communication with and/or review of various information sources, including the SHPO/THPO, Indian tribes, the District Archeologist, District files and records, the latest published/web-based version of the national Register, and other lists of properties determined eligible, as appropriate. The District documents, along with the basis, any determination of no potential to cause effect on historic properties in the administrative record. If necessary, the District may request an investigation in order to make this determination.

6.3 Local Operating Procedures for Tribal Consultation

Tribal consultation for the proposed reissuance of nationwide permits (NWP) for the Department of the Army Regulatory Permit Program was initiated on October 3, 2006 when HQUSACE notified 562 Federally recognized tribes via letter from MG Riley. This letter advised the tribes to comment on the Federal Register notice (71 FR 56258, 26 September 2006) and informed them of the forthcoming District Public Notices (issued by Detroit District for Michigan on 26 October 2006).

On 23 and 24 October 2006, Detroit District initiated consultation on the proposed regional conditions of the NWPs for LRE's regulatory area of responsibility (AOR) covering all of Michigan. In total, the District's public notice was mailed to 41 federally recognized tribes who either currently reside within the AOR (twelve tribes within Michigan) and/or have a potential historical interest within the AOR (all 41 tribes) and/or have adjudicated lands within the AOR (29 tribes, some no longer in Michigan). These tribes and the current proper contact person were identified with the assistance of the LRD tribal liaison officer, and updated with new information learned while making contacts (Reference tribal contact spreadsheets). In addition to mailing the public notice to each tribe, the Detroit District conducted three (3) separate telephone contacts with each of the 41 tribes in the AOR. Each of these contact sessions often required multiple attempts and often required leaving recorded messages. Many tribes were unresponsive. The contacts were tracked on a spreadsheet which is part of the record. The contacts were as follows: a) an initial contact with each tribe on or about 23-24 October 2006 to inform, explain and solicit inquiries regarding the proposed NWPs; b) a second contact on or about 15 November 2006 to inform, explain, and solicit inquiries and/or tribal concerns, and specifically to offer a face to face (government to government) meeting with each tribe; and c) a third contact on or about 4 December 2006 to inform, explain, solicit inquiries, and specifically alert the tribe that the public notice period was coming to a close. Tribal contacts were informed that even after the regional NWP comment period ends, the District is fully open to any subsequent consultation that the tribe desires at any time. A few tribes asked clarification questions, which the District answered. A couple tribes sent responses stating that the tribe had no comments or concerns regarding the proposed regional NWP conditions. No tribe requested a formal consultation face to face meeting. The remaining tribes were silent and unresponsive to the process. None of the 41 tribes provided formal, or even informal, comments to the proposed regional NWP conditions. The general consensus gleaned from the numerous telephone contacts and conversations was that the tribes that were in communication with the District were satisfied with the District's past performance regarding tribal interests, and that the tribes saw no concerns with the proposed regional conditions.

Since we did not receive comments to address, we do not propose to add any special conditions at this time. The District will continue to be open and receptive to any communication from any tribe on any issue. Should review and/or consultation reveal the potential to cause effects on historic properties, the District will immediately advise the applicant of its findings and obligations relative to the NHPA including the Section 106 process, and suspend the NWP verification process until the Section 106 process is complete. The District will provide guidance to the applicant on format and content of the Section 106 review package, will discuss (with the applicant) measures or alternatives to avoid or minimize effects on historic properties,

will identify consulting parties, and will authorize the applicant to initiate Section 106 consultation to obtain consulting party views on the determination and its basis.

After completion of this initial coordination, and following active efforts to reach consulting party agreement on avoidance/minimization measures, the District will assess and fully document the effects of the project proposal and provide to the consulting parties for review. If effect issues cannot be resolved, the District will continue consultation or request an opinion from the Advisory Council on Historic Preservation (ACHP). After consideration of the ACHP opinion, District will document its final decision in the administrative record and provide it to the consulting parties. When the Section 106 process is fulfilled, the District will continue processing the NWP verification request. Any mitigation resulting from the consultation will be incorporated into the permit verification. In addition, the verification will be conditioned to stipulate the DA's authority to revoke or suspend the permit if historic properties are discovered during construction in order to ensure that the permitted activity remains in compliance with the NHPA.

On issuance of a verification, The District, through its routine compliance and enforcement reviews will ensure that conditions for historic properties have been met and ensure that no impacts to historic properties or tribal resources will occur as a result of the permit verification action. In addition to the provisions of General Condition 18, the Detroit District includes the following Special Condition in every NWP verification letter: If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

7.0 Supplement to National Impact Analysis

7.1 Public interest review factors (33 CFR 320.4(a)(1))

In addition to the discussion in the national decision document for this NWP, the Detroit District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

(a) Conservation: Same as discussed in the national decision document.

(b) Economics: Same as discussed in the national decision document. In Michigan, ditches that had been constructed in uplands, some prior to the Clean Water Act, have resulted in drainage of areas that were subsequently developed. Discharges into such ditches may alter or curtail the drainage capacity for the ditch's source or watershed area. This could perhaps result in high water or flooding with economic losses.

(c) Aesthetics: Same as discussed in the national decision document.

(d) General environmental concerns: Same as discussed in the national decision document.

(e) Wetlands: Same as discussed in the national decision document.

- (f) Historic properties: Same as discussed in the national decision document.
- (g) Fish and wildlife values: Same as discussed in the national decision document.
- (h) Flood hazards: Same as discussed in the national decision document.
- (i) Floodplain values: Same as discussed in the national decision document.
- (j) Land use: Same as discussed in the national decision document.
- (k) Navigation: Same as discussed in the national decision document.
- (l) Shore erosion and accretion: Same as discussed in the national decision document.
- (m) Recreation: Same as discussed in the national decision document.
- (n) Water supply and conservation: Same as discussed in the national decision document.
- (o) Water quality: Same as discussed in the national decision document.
- (p) Energy needs: Same as discussed in the national decision document.
- (q) Safety: Same as discussed in the national decision document.
- (r) Food and fiber production: Same as discussed in the national decision document.
- (s) Mineral needs: Same as discussed in the national decision document.
- (t) Considerations of property ownership: Same as discussed in the national decision document.

7.2 Section 404(b)(1) Guidelines Impact Analysis (Subparts C-F)

- (a) Substrate: Same as discussed in the national decision document.
- (b) Suspended particulates/turbidity: Same as discussed in the national decision document.
- (c) Water: Same as discussed in the national decision document.
- (d) Current patterns and water circulation: Same as discussed in the national decision document.
- (e) Normal water level fluctuations: Same as discussed in the national decision document.
- (f) Salinity gradients: Not applicable.

- (g) Threatened and endangered species: Same as discussed in the national decision document, and refer to Part 5 above.
- (h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web: Same as discussed in the national decision document.
- (i) Other wildlife: Same as discussed in the national decision document.
- (j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:
- (1) Sanctuaries and refuges: Same as discussed in the national decision document.
 - (2) Wetlands: Same as discussed in the national decision document.
 - (3) Mud flats: Same as discussed in the national decision document.
 - (4) Vegetated shallows: Same as discussed in the national decision document.
 - (5) Coral reefs: Not applicable.
 - (6) Riffle and pool complexes: Same as discussed in the national decision document.
- (k) Municipal and private water supplies: Same as discussed in the national decision document.
- (l) Recreational and commercial fisheries: Same as discussed in the national decision document.
- (m) Water-related recreation: Same as discussed in the national decision document.
- (n) Aesthetics: Same as discussed in the national decision document.
- (o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national decision document.

8.0 List of Final Corps Regional Conditions for NWP 46

The Detroit District does not propose any regional conditions specific for NWP 46.

Regional Conditions Applicable to all NWPs in Michigan

8.1 Regional condition 1

Based on a joint processing agreement between the Corps of Engineers (Corps) and the Michigan Department of Environmental Quality (MDEQ), submittal of a joint Corps/MDEQ permit application is required for projects in Michigan. The submittal of an application is not an authorization to perform the work.

8.2 Regional condition 2

In NWP verification letters, the Corps will state that: "The permittee shall not initiate activities authorized under the NWP until all required State authorizations have been received."

8.3 Regional condition 3

If the Michigan Department of Environmental Quality has issued its authorization, we shall presume that 401 Water Quality Certification and Coastal Zone Management certification has been satisfied.

8.4 Regional condition 4

Excavation/dredging from areas of known or suspected contamination requires:

- a. Placement of the material in a Confined Disposal Facility or MDEQ Class II landfill; or
- b. Placement of the material shoreward of a bulkhead or in uplands, and covered with at least 2 feet of clay and a layer of sod; or
- c. Testing to demonstrate that the material is not contaminated. If the material is determined to be contaminated, it must be disposed of in a. or b. above.

8.5 Regional condition 5

Dredging will be performed during MDNR preferred dredge periods except when the Corps has specifically determined that the limits are unwarranted (for example, MDEQ has issued a permit and has not restricted the dredging activities to these periods).

8.6 Regional condition 6

Critical Resource Waters:

- a. NOAA-Designated Marine Sanctuaries: The Thunder Bay National Marine Sanctuary and Underwater Preserve is located in Lake Huron off Alpena, Michigan.
- b. National Estuarine Research Reserves (NERR): There are no NERRs within the Detroit District.
- c. State Natural Heritage Sites: There are no areas designated as state natural heritage sites through a state legislative or regulatory process.
- d. Outstanding National Resource Waters or Other Waters Officially Designated: The list of Critical Resources Waters (General Condition 19) in Michigan is amended to include the following:
 - (i) All areas designated under Part 351, Wilderness and Natural Areas, of the Natural Resources and Environmental Protection Act, Public Act 451, 1994, as amended.
 - (ii) All rivers designated under Part 305, Natural Rivers, of the Natural Resources and Environmental Protection Act, as amended.
 - (iii) All Environmental Areas designated under Part 323, Shorelands Protection and Management, of the Natural Resources and Environmental Protection Act, as amended.

8.7 Regional condition 7

National Wild and Scenic Rivers (NWSR): The following Wild & Scenic Rivers are located within Detroit District:

- Au Sable River – main stem from the Mio Pond project boundary downstream to the Alcona Pond project boundary.
- Bear Creek (Manistee County) – Coates Highway to the confluence with the Manistee River.
- Black River (Gogebic County) - from the Ottawa National Forest boundary to Lake Superior.
- Carp River – from the west section line of section 30, T43N, R5W to Lake Huron.
- Indian River – from Hovey Lake to Indian Lake.
- Manistee River – from the MDNR boat ramp below Tippy Dam to the Michigan State Highway 55 bridge.
- Ontonagon River – East Branch from its origin to the Ottawa NF boundary; the Middle Branch from its origin to the northern boundary of the Ottawa NF, the Cisco Branch from its origin at Cisco Lake Dam to its confluence with Ten-Mile Creek south of Ewen, the West Branch from its confluence with Cascade Falls to Victoria Reservoir.
- Paint River – main stem from the confluence of the North and South Branches to the Ottawa NF boundary, the North Branch from its origin to its confluence with the South Branch, the South Branch from its origin to its confluence with the North Branch.
- Pere Marquette River – the segment downstream from the junction of the Middle and Little south Branches to its junction with Pere Marquette Highway (old US Highway 31).
- Pine River – the segment from Lincoln Bridge to the east 1/16th line of Section 16, T21N, R13W.
- Presque Isle River – the main stem from the confluence of the East and West Branches to the Minnewawa Falls, the East Branch within the Ottawa NF, the South Branch within the Ottawa NF, the West Branch within the Ottawa NF.
- Sturgeon River (Baraga and Houghton Counties) – from its entry into the Ottawa NF to the northern boundary of the Ottawa NF.
- Sturgeon River (Alger and Delta Counties) – from the north line of Section 26, T43N, R19W to Lake Michigan.
- Tahquamenon River East Branch – from its origin to the Hiawatha National Forest boundary.
- Whitefish River – The main stem from its confluence with the East and West Branches to Lake Michigan. The East Branch from the crossing of County Road 003 to its confluence with the West Branch. The West Branch from County Road 444 to its confluence with the East Branch.
- Yellow Dog River – From its origin at the outlet of Bulldog Lake Dam to the boundary of the Ottawa NF.

Portions of the following have also been designated as a “study river” for possible inclusion in the system: Brule River, Carp River, Little Manistee River, Paint River, Presque Isle River, Ontonagon River, Sturgeon River (Baraga and Houghton Counties), Sturgeon River (Alger and Delta Counties), Tahquamenon River, White River, Whitefish River.

8.8 Regional condition 8

Critical Habitat for Federally Listed Threatened and Endangered Species in the Detroit District:

Critical habitat for the piping plover (*Charadrius melodus*) in Michigan was designated in the May 7, 2001 Federal Register (Vol. 66, No. 88, pages 22938-22969).

Critical habitat for the Hine's Emerald Dragonfly (*Somatochlora hineana*) in Michigan was proposed on July 26, 2006 Federal Register (Vol. 71, No. 143, pages 42441-42519).

9.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

(1) The MDEQ denies Water Quality Certification (WQC) and finds that projects proposed under this NWP are inconsistent with the Coastal Zone Management Program (CZM) (Encl. 7).

(2) The MDEQ provided an addendum to its comments on May 24, 2007 (Encl. 7) stating a general condition applicable to all NWPs in order to receive Section 401 Water Quality Certification (WQC) and Section 307(c) (1) Coastal Zone Management (CZM) federal consistency:

In sensitive natural resource areas, NWPs may only be issued if a state permit is also issued. These areas include: Designated Natural Rivers, Designated High Risk Erosion Areas, Designated Wilderness and Natural Areas, Designated Environmental Areas, areas containing state or federally listed or proposed threatened or endangered species, Designated Trout Streams, Designated Critical Dune Areas, and identified historic or archeological areas. NWPs issued absent state permit in these areas are denied Section 401 water quality certification and would be inconsistent with Michigan's CZM Program.

The District will include this as an MDEQ general condition in NWP 46 and each NWP despite the MDEQ's denial of this NWP.

(3) The Detroit District provided its public notice and communicated or attempted to communicate three times with each Native American Tribe with interests in Michigan. The District responded to a few questions. No Tribe provided any comments to the proposed NWPs.

(4) The U.S. Environmental Protection Agency (EPA) has responsibility for 401 water quality certification on tribal lands in Michigan. Detroit District provided notification to EPA of the issuance in the Federal Register of the proposed NWPs (Encl. 4). The District notified EPA of the issuance of the Detroit District's public notice for proposed regional conditions for the NWPs (Encl. 5). Both communications apprised EPA of the 60-day response period after the final NWPs were issued in the Federal Register to provide input. Finally, Detroit District provided an alert to the impending lapse of the 60-day deadline (Encl. 6). No communication was received from EPA. Therefore, we presume that Section 401 WQC on tribal lands is waived.

The MDEQ denial of WQC/CZM consistency for this NWP means the Corps cannot presume consistency. The State must process an application for this type of proposed work under one of its procedures. If, after doing so, the MDEQ issues a permit for work, then to the extent of the authorization provided in the MDEQ permit, the MDEQ has also provided WQC/CZM consistency. At that time, the Corps may proceed with NWP 46.

10.0 Cumulative Impacts

The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used and the quantity and quality of waters of the United States lost due to the activities authorized by this NWP. This is a new NWP and we therefore have no previous usage data. Since the authorization is only for non-tidal ditches constructed in uplands, and that in 1984 a portion of the Corps' regulatory responsibilities was assumed by the MDEQ, and that the MDEQ has denied WQC and CZM consistency for this NWP, the Detroit District expects very few applications to qualify for review under this NWP. The Detroit District anticipates that NWP 46 will not be used in Michigan during the authorization period.

The terms and conditions of the NWP, including the pre-construction notification requirements and the regional conditions listed in Section 7.0 of this document, will ensure that this NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in General Condition 19, the regional conditions 6, 7, and 8 discussed in this document, the pre-construction notification requirements of the NWP, and the application requirements in regional condition 1. Through the pre-construction notification process, the Detroit District will review certain activities on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. As a result of this review, the district engineer can add special conditions to the NWP authorization on a case-by-case basis to ensure that the activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. During the pre-construction notification process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

Detroit District will use its joint application process with the State of Michigan to evaluate and determine whether activities may result in more than minimal individual or cumulative adverse effects. If, at a later time, there is clear, unequivocal evidence that the NWP would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, the modification, suspension, or revocation procedures at 33 CFR 330.4(e) or 33 CFR 330.5 will be used.

11.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, all regional conditions, and limitations, will authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively.

Date: _____

BRUCE A. BERWICK
Division Engineer
Great Lakes & Ohio River Division

Enclosures

1. Public Notice dtd. Oct. 24, 2006 & distribution lists
2. USFWS letter Dec. 8, 2006
3. MDEQ letter May 11, 2007
4. USACE letter to EPA Oct. 19, 2006
5. USACE letter to EPA Oct. 24, 2006
6. USACE letter to EPA Apr. 30, 2007
7. MDEQ letter May 24, 2007